



4510-29-P

**DEPARTMENT OF LABOR**

Employee Benefits Security Administration

Exemptions from Certain Prohibited Transaction Restrictions

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Grant of Individual Exemptions.

**SUMMARY:** This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice includes the following: **D-11661, Bayer Corporation (Bayer or the Applicants), PTE 2011-23; L-11618, Oregon-Washington Carpenters Employers Apprenticeship and Training Trust Fund (the Plan), PTE 2011-24:** A notice was published in the Federal Register of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, D.C. The notice also invited interested persons to

submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

#### Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

- (a) The exemption is administratively feasible;
- (b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

Bayer Corporation (Bayer or the Applicant)

Located in Pittsburgh, PA

[Prohibited Transaction Exemption **2011-23**;

Exemption Application No. **D-11661**]

#### EXEMPTION

The restrictions of sections 406(a)(1)(A) and 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975(c)(1)(A) and (E) of the Code, shall not apply, effective September 14, 2011, to the one-time, in kind contribution (the Contribution) of certain U.S. Treasury Bills (the Securities) to the Bayer Corporation Pension Plan (the Plan) by the Applicant, a party in interest with respect to the Plan, provided that the following conditions are satisfied:

(a) In addition to the Securities, Bayer contributed to the Plan, by September 15, 2011, such cash amounts as are needed to allow the Plan to attain an Adjusted Funding Target Attainment Percentage (AFTAP) of 90%, as determined by the Plan's actuary (the Actuary);

(b) The fair market value of the Securities was determined by Bayer on the date of the Contribution (the Contribution Date) based on the average of the bid and ask prices as of 3:00 p.m. Eastern Time, as quoted in The Wall Street Journal on the

Contribution Date;

(c) The Securities represented less than 20% of the Plan's assets.

(d) The terms of the Contribution were no less favorable to the Plan than those negotiated at arm's length under similar circumstances between unrelated parties;

(e) The Plan paid no commissions, costs or fees with respect to the Contribution; and

(f) The Plan fiduciaries reviewed and approved the methodology used to value the Securities and ensured that such methodology was properly applied in determining the fair market value of the Securities.

*Effective Date:* This exemption is effective as of September 14, 2011.

#### WRITTEN COMMENTS

In the Notice of Proposed Exemption (76 FR 49795, August 11, 2011) (the Notice), the Department invited all interested persons to submit written comments and requests for a hearing on the Notice within forty (40) days of the date of the publication of such Notice in the Federal Register. All comments and requests for a hearing from interested persons were due by September 20,

2011.

During the comment period, the Department received over 150 telephone calls, 15 written comments, which included one from Bayer, and 3 requests for a public hearing. The majority of telephone callers requested an explanation of the Notice while a minority expressed opposition to the granting of the Notice because of concern that the Securities were not safe investments for the Plan.

With respect to the written comments that were submitted by Plan participants or beneficiaries, four commenters said they were in favor of the Department granting the exemption while ten commenters said they were opposed due to concern that the Securities were not a safe investment for the Plan. Three such commenters requested that a public hearing be convened, but they did not raise any material issues that would warrant a hearing.

The sole substantive written comments received by the Department were submitted by 2 commenters in identical letters requesting that Bayer explain: (1) certain benefit restrictions that would be imposed on Plan participants in the absence of the Contribution; (2) Bayer's rationale for making bonus payments to active employees rather than making up Plan losses; and (3) Bayer's rationale for allowing profits from its U.S. operations to be taken overseas while neglecting the Plan.

With respect to their first comment regarding benefit restrictions, the commenters asked why Bayer had mentioned the potential restrictions of sections 206(g) of the Act and section 436(d)(3) of the Code in its application, which would limit lump sum payments to 50% of the participant's benefit and would defer Plan Social Security level income payouts. In response, to the commenters' concern, Bayer stated that the Pension Protection Act required it to fund a minimum required amount based on an actuarial calculation, which for Plan Year 2010 was approximately \$13 million. Consistent with past practice, Bayer explained that its goal for Plan Year 2010 was to fund the Plan at 90% or greater AFTAP level. To reach this objective, Bayer said it would contribute \$300 million in Securities to the Plan. As a result, Bayer believed the exemption would benefit the participants by adding an extra \$285 million of value into the Plan above the minimum funding requirement.

In their second comment, the commenters asked Bayer why it had paid out generous bonuses to all active employees over the last two years instead of paying lost monies when the Plan had investment losses of 28% in 2008. In response, Bayer explained that it would meet its minimum funding obligation requirement for Plan Year 2010. Since 2008, Bayer noted that it had consistently exceeded the minimum funding requirement. Bayer also explained

it had an obligation to pay bonuses in order to attract and retain talent.

In their third comment, the commenters questioned why Bayer had been allowed to take profits made from its U.S. operations out of the country, when the Plan had not been paid up to the extent required. In response, Bayer explained that since 2008, it has exceeded the funding requirements irrespective of its financial performance.

#### The Applicant's Comment

Bayer submitted a written comment requesting certain clarifications to the Notice. First, in order to comply with the wishes of its Tax Department, Bayer requested that it be allowed to make the Contribution on September 14, 2011 instead of September 15, 2011.

The Department concurred with this date change shortly before the Contribution and it has revised the grant notice in the operative language in the transaction description and in the section captioned "*Effective Date*" to reflect the actual Contribution date of September 14, 2011. The Department also notes a corresponding change to the Notice on page 49796 in Representation 13.

Second, Bayer requested that on page 49795, Representation 2



of the Notice should be amended to state that the Plan had total assets of "\$2,126,444,422" instead of "\$2,126,444,442." In response, the Department notes this revision to Representation 2 of the Notice.

Third, Bayer requested that the heading "Plan Funding for Plan Year 2011" on page 49795 of the Notice be modified to read "Plan Funding for Plan Year 2010" instead. The Department notes this change to page 49795 of the Notice.

Fourth, Bayer requested that on page 49795 of the Notice, the first sentence of Representation 4, which states that the AFTAP funding level for the Plans ranges from "90% to 96%" should be changed to "90% to 98%." The Department notes this modification to Representation 4 of the Notice.

Fifth, Bayer requested that on page 49796 of the Notice, the third sentence of Representation 12 which reads: "The Applicant states that the proposed Contribution also would violate sections 406(b)(1) and (2) of the Act," should be revised by changing the words "would violate" to "may implicate." In response to this comment, the Department disagrees with this modification requested by Bayer because the Contribution would have constituted a violation of section 406(b)(1) and (2) of the Act, absent an administrative exemption. Accordingly, the Department has not noted this clarification to the Notice.

### Contribution Amount Discrepancy

At the Department's request, Bayer confirmed that it had made the Contribution to the Plan on September 14, 2011. The face value of the Securities as of 3 p.m. Eastern Time on September 14, 2011 was \$299,997,330. Bayer contributed an additional \$2,670 in cash to bring the Contribution to \$300,000,000. Then, Bayer made an additional cash contribution of \$4,997,330 to the Plan. Bayer represented that the Contribution and the additional cash contribution raised the Plan's AFTAP to 92.56%. However, the total cash contribution of \$5,000,000 differed from the estimated \$58 million cash contribution discussed in Representation 14 of the Notice. This discrepancy concerned the Department, which requested a written explanation from Bayer.

Subsequently, Bayer submitted an explanation prepared by the Plan's Actuary, which attributed this discrepancy to in large part to 2010 investment returns of approximately 14% instead of the assumed 8% rate of return. Additional factors considered by the Plan's Actuary included the use of actual census data and the reflection of updated prescribed assumptions, including an actual 6.29% effective interest rate instead of an assumed 6.20% effective interest rate. As a result, Bayer had only to

contribute approximately \$305 million in cash and the Securities to obtain an AFTAP of 92.56%.

The Department reviewed the Actuary's explanation, the Actuary's Plan estimates as of November 1, 2010, the Bayer Corporation Pension Plan Actuarial Valuation Report for Plan Year Beginning January 1, 2011 (the Actuary's Report), the Actuary's Report for Plan Year Beginning January 1, 2010, and supporting memoranda. The Department used the submitted information to estimate what would have been (1) the Plan's assets as of January 1, 2011, (2) the funding target, and (3) the funding target asset percentage, based on the Plan's investment rate of return for 2010 and the effective interest rate for 2011, that were assumed by the Plan's Actuary when it prepared the November 1, 2010 estimates of the then estimated \$358 million contribution. Based on the Department's findings, the lowering of the funding contribution by \$50 million to a total contribution of \$308 million (which also included a \$3.5 million cash contribution that Bayer made to the Plan in January 2011), seemed reasonable.

Accordingly, after giving full consideration to the entire record, including the Applicant's written comments and the written comments and requests for a public hearing submitted by Plan participants and beneficiaries, the Department has

determined to grant the exemption as clarified herein. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the Notice published on August 11, 2011 at 76 FR 49795.

FOR FURTHER INFORMATION CONTACT: Mr. Anh-Viet Ly of the Department at (202) 693-8648. (This is not a toll-free number.)

Oregon-Washington Carpenters Employers Apprenticeship and  
Training Trust Fund (the Plan)

Located in Portland, Oregon

[Prohibited Transaction Exemption **2011-24**;

Exemption Application No. **L-11618**]

#### EXEMPTION

The restrictions of sections 406(a)(1)(A) and (D) of the Act, shall not apply to the sale by the Plan of certain unimproved real property known as "Tax Lot 300" and "Tax Lot 400" (together, the Tax Lots or the Property), to the Pacific Northwest Regional Council of Carpenters (the Union), a party in interest with respect to the Plan, provided that the following conditions are satisfied:

(a) The sale is a one-time transaction for cash;

(b) At the time of the sale, the Plan receives the greater of either: (1) \$390,000; or (2) the fair market value of the Property as established by a qualified, independent appraiser in an updated appraisal of such Property on the date of the sale;

(c) The Plan pays no fees, commissions or other expenses associated with the sale;

(d) The terms and conditions of the sale are at least as favorable to the Plan as those obtainable in an arm's length

transaction with an unrelated third party;

(e) The Plan trustees appointed by the Union recuse themselves from discussions and voting with respect to the Plan's decision to enter into the proposed sale; and

(f) The Plan trustees appointed by the employer associations, who have no interest in the proposed sale, (1) determine, among other things, whether it is in the best interest of the Plan to proceed with the sale of the Property; (2) review and approve the methodology used in the appraisal that is being relied upon; and (3) ensure that such methodology is applied by the qualified, independent appraiser in determining the fair market value of the Property on the date of the sale.

For a complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on September 26, 2011 in the Federal Register at 76 FR 59438.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady of the Department at (202) 693-8556. (This is not a toll-free number.)

#### GENERAL INFORMATION

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, D.C., this 7th day of December, 2011.

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Ivan Strasfeld  
Director of Exemption Determinations  
Employee Benefits Security  
Administration  
U.S. DEPARTMENT OF LABOR

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